

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WILLIAM BLACK,	)	
	)	No. CV-09-141-CI
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING MOTION AND
	)	<b>AMENDING</b> ORDER GRANTING
MICHAEL J. ASTRUE,	)	PLAINTIFF'S MOTION FOR
Commissioner of Social	)	SUMMARY JUDGMENT AND
Security,	)	REMANDING FOR ADDITIONAL
	)	PROCEEDINGS
Defendant.	)	
	)	
	)	

BEFORE THE COURT is Defendant's Motion for Reconsideration Pursuant to FED. R. CIV. P. 59(e). (Ct. Rec. 23.) Attorney Rebecca M. Coufal represents Plaintiff; Special Assistant United States Attorney Michael S. Howard represents Defendant. After reviewing Defendant's Motion and the record, the court concludes its Order Granting Plaintiff's Motion for Summary Judgment and Remanding for Additional Proceedings Pursuant to Sentence Four 42 U.S.C. § 405(g) (Ct. Rec. 21) should be amended pursuant to FED. R. CIV. P. 60(a).

**BACKGROUND**

Plaintiff William Black (Plaintiff) protectively filed for supplemental security income on September 21, 2004, and filed for disability income benefits on September 29, 2004. (Tr. 17, 59, 61.)

1 Benefits were denied initially and on reconsideration. (Tr. 44, 47.)  
2 After a hearing before administrative law judge (ALJ) Paul Gaughen on  
3 April 26, 2007, the ALJ denied benefits and the Appeals Council denied  
4 review. (Tr. 6, 17-26, 638-80.) Plaintiff filed a civil action in  
5 district court to obtain judicial review of the agency's decision.  
6 (Ct. Rec. 4.) Plaintiff and Defendant filed cross-Motions for Summary  
7 Judgment, and this court entered an Order Granting Plaintiff's Motion  
8 for Summary Judgment and Remanding for Additional Proceedings Pursuant  
9 to Sentence Four 42 U.S.C. § 405(g) on April 27, 2010 ("Order Granting  
10 Plaintiff's Motion for Summary Judgment"). (Ct. Rec. 13, 19, 21.)  
11 Defendant timely filed a Motion for Reconsideration Pursuant to FED.  
12 R. Civ. P. 59(e) on May 6, 2010. (Ct. Rec. 24.)

#### 13 **BASIS FOR REVIEW**

14 Under FED. R. Civ. P. 59(e), it is appropriate to alter or amend  
15 a judgment if (1) the district court is presented with newly  
16 discovered evidence, (2) the district court committed clear error or  
17 made an initial decision that was manifestly unjust, or (3) there was  
18 an intervening change in controlling law. *United Nat. Ins. Co. v.*  
19 *Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009), citing  
20 *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). While  
21 Rule 59(e) permits a district court to reconsider and amend a previous  
22 order, the Rule offers an extraordinary remedy, to be used sparingly  
23 in the interests of finality and conservation of judicial resources.  
24 *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). The history  
25 of Rule 59(e) shows that "alter or amend" means a substantive change  
26 of mind by the court. *Miller v. Transamerican Press, Inc.*, 709 F.2d  
27 524, 527 (9<sup>th</sup> Cir. 1983).

28 FED. R. Civ. P. 60(a) provides the court may correct a clerical

1 mistake or a mistake arising from oversight or omission. In deciding  
2 whether FED. R. CIV. P. 60(a) applies, the focus is on what the court  
3 originally intended to do. *Blanton v. Anzalone*, 813 F.2d 1574, 1577  
4 (9<sup>th</sup> Cir. 1987). A judge may use Rule 60(a) "to make an order reflect  
5 the actual intentions of the court, plus necessary implications."  
6 *Jones & Guerrero Co. V. Sealift Pacific*, 650 F.2d 1072, 1074 (9<sup>th</sup> Cir.  
7 1981). Errors correctable under Rule 60(a) include those where what  
8 is written or recorded is not what the court intended to write or  
9 record. *In re Jee*, 799 F.2d 532, 535 99<sup>th</sup> Cir. 1986). The basic  
10 distinction between clerical mistakes and mistakes that cannot be  
11 corrected pursuant to Rule 60(a) is that the former consist of  
12 "blunders in execution" and the latter consist of instances where the  
13 court changes its mind because of a legal or factual mistake in the  
14 original determination, or because on second thought it has decided to  
15 exercise its discretion in a different manner than in the original  
16 determination. *Blanton*, 813 F.2d at 1577.

17 Although Defendant's Motion is a Rule 59(e) motion, "nomenclature  
18 is not controlling." *Sea Ranch Ass'n v. California Coast Zone*  
19 *Conversation Comm'ns*, 537 F.2d 1058, 1061 (9<sup>th</sup> Cir. 1976). The court  
20 will construe the Motion, however styled, to be the type proper for  
21 the relief requested. *Miller*, 709 F.2d at 528. A Rule 59(e) motion  
22 may be construed as a Rule 60(a) motion when appropriate. *See id.*;  
23 *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9<sup>th</sup> Cir. 1979), *cert.*  
24 *denied*, 458 U.S. 1106 (1982).

#### 25 **ISSUE**

26 Defendant argues the court should amend or alter its judgment  
27 because the court committed legal error by applying the "clear and  
28 convincing" standard to the ALJ's credibility determination.

**DISCUSSION**

The court has reviewed the pending Motion, briefing and reviewed the evidence of record. The ALJ concluded that Plaintiff's statements concerning the intensity, persistence and limiting effects of his symptoms were not entirely credible. (Tr. 23.) Plaintiff's Memorandum in Support of Motion for Summary Judgment challenged the ALJ's credibility finding. (Ct. Rec. 14 at 22.) Defendant argued the reasons cited by the ALJ in support of the credibility finding were legally sufficient. (Ct. Rec. 20 at 3-6.)

The court set forth the standard of review in its Order Granting Plaintiff's Motion for Summary Judgment. (Ct. Rec. 21 at 3-4, 14-15.) In reviewing the ALJ's denial of disability benefits, the court reviews the ALJ's findings to ensure the ALJ applied the correct legal standards and the entire record is reviewed to insure that the findings are supported by substantial evidence. *Young v. Sullivan*, 911 F.2d 180, 183 (9<sup>th</sup> Cir. 1990); *Martinez v. Heckler*, 807 F.2d 771, 772 (9<sup>th</sup> Cir. 1986). The ALJ's decision must be upheld when the determination is not based on legal error and is supported by substantial evidence. *See Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999); *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985). For a negative credibility finding, the reasons given by the ALJ must be "clear and convincing" in the absence of affirmative evidence of malingering. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007); *Vertigan v. Halter*, 504 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan v. Apfel*, 169 F.3d 599, 601-02 (9<sup>th</sup> Cir. 1999). The court determined the reasons cited by the ALJ in support of the negative credibility finding are inadequate and directed the ALJ to reconsider the

1 credibility evidence on remand.<sup>1</sup> (Ct. Rec. 21 at 16.)

2 However, in reviewing the ALJ's decision and the evidence  
3 supporting determination, the court utilized the phrase "clear and  
4 convincing evidence" when the intention was to reference "clear and  
5 convincing reasons supported by substantial evidence." (Ct. Rec. 21  
6 at 16.) Also mentioned in the decision was "clear and convincing"  
7 evidence when the intention was to reference "substantial" evidence.  
8 (Ct. Rec. 21 at 16-19.) The error in terminology suggests an  
9 erroneous application of a "clear and convincing" standard in  
10 evaluating the ALJ's credibility finding, although the intention was  
11 to apply, and the court did apply, the "substantial evidence"  
12 standard.

13 The error was in the nature of a scrivener's error, and not a  
14 change in the substantive findings of the court, and as a result, the  
15 Order Granting Plaintiff's Motion for Summary Judgment should be  
16 amended.

17 **IT IS ORDERED:**

18 1. Defendant's Rule 59(e) Motion for Reconsideration (**Ct. Rec.**  
19 **23**) is construed as a Rule 60(a) Motion to Amend and is **GRANTED**.

20 2. The Order Granting Summary Judgment, under the "Discussion"  
21 section, beginning with **"2. Credibility"** is **AMENDED** to read as  
22 follows:

23 **2. Credibility**

24 Plaintiff argues the ALJ provided no reasons for the  
25 adverse credibility finding. (Ct. Rec. 14 at 22.) In social  
security proceedings, the claimant must prove the existence

---

26 <sup>1</sup>The court also concluded substantial evidence does not support  
27 the ALJ's findings regarding the opinion evidence. (Ct. Rec. 21 at 9-  
28 14.) Defendant does not seek reconsideration on this issue.

1 of a physical or mental impairment by providing medical  
2 evidence consisting of signs, symptoms, and laboratory  
3 findings; the claimant's own statement of symptoms alone  
4 will not suffice. 20 C.F.R. § 416.908. The effects of all  
5 symptoms must be evaluated on the basis of a medically  
6 determinable impairment which can be shown to be the cause  
7 of the symptoms. 20 C.F.R. § 4416.929.

8 Once medical evidence of an underlying impairment has  
9 been shown, medical findings are not required to support the  
10 alleged severity of the symptoms. *Bunnell v. Sullivan*, 947  
11 F.2d 341, 345 (9<sup>th</sup> Cir. 1991). If there is evidence of a  
12 medically determinable impairment likely to cause an alleged  
13 symptom and there is no evidence of malingering, the ALJ  
14 must provide specific and cogent reasons for rejecting a  
15 claimant's subjective complaints. *Id.* at 346. The ALJ may  
16 not discredit pain testimony merely because a claimant's  
17 reported degree of pain is unsupported by objective medical  
18 findings. *Fair v. Bowen*, 885 F.2d 597, 601 (9<sup>th</sup> Cir. 1989).  
19 The following factors may also be considered: (1) the  
20 claimant's reputation for truthfulness; (2) inconsistencies  
21 in the claimant's testimony or between his testimony and his  
22 conduct; (3) claimant's daily living activities; (4)  
23 claimant's work record; and (5) testimony from physicians or  
24 third parties concerning the nature, severity, and effect of  
25 claimant's condition. *Thomas v. Barnhart*, 278 F.3d 947, 958  
26 (9<sup>th</sup> Cir. 2002).

27 If the ALJ finds that the claimant's testimony as to  
28 the severity of her pain and impairments is unreliable, the  
ALJ must make a credibility determination with findings  
sufficiently specific to permit the court to conclude that  
the ALJ did not arbitrarily discredit claimant's testimony.  
*Morgan v. Apfel*, 169 F.3d 599, 601-02 (9<sup>th</sup> Cir. 1999). In  
the absence of affirmative evidence of malingering, the  
ALJ's reasons must be "clear and convincing." *Lingenfelter*  
*v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007); *Vertigan*  
*v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169  
F.3d at 599. The ALJ "must specifically identify the  
testimony she or he finds not to be credible and must  
explain what evidence undermines the testimony." *Holohan v.*  
*Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir. 2001)(citation  
omitted).

23 Plaintiff acknowledges the ALJ concluded Plaintiff was  
24 credible as to some of his symptoms, but asserts the ALJ did  
25 not give reasons for rejecting Plaintiff's testimony. (Ct.  
26 Rec. 14 at 19-22.) The ALJ determined that if Plaintiff  
27 stopped substance abuse, Plaintiff's medically determinable  
28 impairments could reasonably be expected to produce the  
alleged symptoms, but that the claimant's statements  
concerning the intensity, persistence and limiting effects  
of these symptoms are not entirely credible. (Tr. 23.)  
Plaintiff is incorrect that the ALJ cited no reasons for  
rejecting Plaintiff's statements, but nonetheless, the ALJ's

1 reasons supporting the negative credibility finding are  
2 inadequate.

3 The ALJ rejected specific assertions by Plaintiff as  
4 not credible. (Tr. 24.) First, the ALJ rejected  
5 Plaintiff's reports of paranoia and hallucinations. (Tr.  
6 397-433, 452-56.) The first reason given by the ALJ for  
7 rejecting these symptoms is "the claimant is not adept at  
8 assessing his own functioning without substance abuse."  
9 (Tr. 24.) This statement is not based on any evidence in  
10 record and is therefore not a clear and convincing reason  
11 **supported by substantial evidence** for rejecting Plaintiff's  
12 statements regarding paranoia and hallucinations. The ALJ  
13 also pointed to notes from Hope Partners from late 2005 to  
14 February 2007, which show Plaintiff did not report  
15 hallucination to his counselor, except for one instance of  
16 hallucinations while sleeping. (Tr. 24.) However, during  
17 that period, Plaintiff did report hallucinations and  
18 paranoia to Hope Partners counselors, as well as to other  
19 examining and treating sources. (Tr. 326, 453, 458-63, 554,  
20 557, 563, 603, 610.) Thus, the ALJ justification for  
21 rejecting Plaintiff's statements about hallucinations and  
22 paranoia is not supported by **substantial** evidence.

23 The ALJ also rejected Plaintiff's statement that he has  
24 not used alcohol for two and a half years. (Tr. 24.) The  
25 only reason given by the ALJ for rejecting Plaintiff's  
26 statement regarding last alcohol use is "given the number of  
27 relapses the claimant has endured, the undersigned finds the  
28 claimant not credible on this issue." (Tr. 24.)  
Conflicting or inconsistent testimony concerning alcohol use  
can contribute to an adverse credibility finding. *Robbins*.  
*V. Soc. Sec. Admin.*, 466 F.3d 880, 884 (9<sup>th</sup> Cir. 2006).  
While there is evidence of past treatment and relapses in  
the record (Tr. 169), without similar evidence during the  
period of time at issue, it is not appropriate to assume  
Plaintiff has relapsed again. The ALJ did not identify any  
evidence of conflicting reports by Plaintiff, nor any  
evidence of suspected alcohol use by Plaintiff's medical or  
mental health providers. The ALJ's statement regarding  
Plaintiff's alcohol use is based on speculation, not  
evidence. Therefore, the ALJ did not cite **substantial**  
evidence justifying rejection of Plaintiff's statement  
regarding last alcohol use.

23 Further evidence that Plaintiff is not credible, the  
24 ALJ cited Plaintiff's activities of daily living during  
25 periods of sobriety. (Tr. 23.) Evidence about daily  
26 activities is properly considered in making a credibility  
27 determination. *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir.  
28 1989). However, a claimant need not be utterly  
incapacitated to be eligible for benefits. *Id.* Many  
activities are not easily transferable to what may be the  
more grueling environment of the workplace, where it might  
not be possible to rest or take medication. *Id.* Yet daily



1 activities may be grounds for an adverse credibility finding  
2 if a claimant is able to spend a substantial part of his day  
3 engaged in pursuits involving the performance of physical  
4 functions that are transferable to a work setting. *Orn v.*  
5 *Astrue*, 495 F.3d 625, 639 (9<sup>th</sup> Cir. 2007). The ALJ cited  
6 evidence that Plaintiff kept his apartment clean, tidy and  
7 stocked with food. (Tr. 23, 211.) He read books, and  
8 reported reading two books in two days. (Tr. 213-14.)  
9 Plaintiff also described himself as friendly and able to get  
10 along with others, and participated in social activities  
11 such as group picnics and movies with friends. (Tr. 222,  
12 661.) Plaintiff demonstrated good reasoning skills and  
13 adequate judgment by shopping around for better prices.  
14 (Tr. 667.) The ALJ noted Plaintiff had some motivational  
15 problems regarding his volunteer work at the Evergreen Club,  
16 but those problems apparently resolved by the hearing when  
17 Plaintiff testified he volunteers in the business section  
18 and finds it helpful. (Tr. 24, 588-90, 659.) These  
19 activities are not necessarily inconsistent with disability,  
20 especially a disability due to bipolar disorder or  
21 depression. There is evidence that Plaintiff's volunteer  
22 work is not consistent with competitive employment, and in  
23 fact Plaintiff stopped volunteer work for some period of  
24 time. (Tr. 588-90, 659, 673.) Although Plaintiff did  
25 testify that he goes to movies with friends and enjoys group  
26 activities, he also testified that he stays home or cancels  
27 plans when he cannot go out. (Tr. 660-65.) The activities  
28 of daily living cited by the ALJ do not, without more,  
constitute **substantial** evidence justifying and adverse  
credibility finding.

The ALJ also pointed out that notes from Hope Partners  
from late 2005 to February 2007 show Plaintiff took part in  
social activities and was able to maintain attention and  
concentration. (Tr. 24, Tr. 506-93.) He consistently  
attended treatment and was talkative and attentive during  
meetings. (E.g., Tr. 506, 511, 513, 514, 518, 521, 532,  
534.) However, the ALJ did not mention Hope Partners  
records showing Plaintiff was depressed and did not go out,  
did not participate in a writing activity due to lack of  
concentration, had a week-long bout of depression, reported  
no ambition and trouble sleeping, had thoughts of dying, and  
was observed to be in a depressed mood. (Tr. 515-17, 530,  
554, 557, 586.)

Based on the foregoing, the ALJ's credibility  
determination is not supported by the evidence. Although  
the ALJ is responsible for resolving ambiguities in the  
evidence, the ALJ **did not provide clear and convincing  
reasons supported by substantial evidence**. Thus, the ALJ  
erred.

3. The court's Order Granting Plaintiff's Motion for Summary



1 Judgment is not otherwise altered. Substantial evidence does not  
2 support the ALJ's credibility determination for the reasons mentioned  
3 in the Order Granting Plaintiff's Motion for Summary Judgment.  
4 Accordingly, on remand credibility should be reassessed.

5 DATED July 12, 2010.

6  
7 S/ CYNTHIA IMBROGNO  
8 UNITED STATES MAGISTRATE JUDGE  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28